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The establishment of electoral law in revolutionary France

<http://dx.doi.org/10.12775/SIT.2019.002>

During the course of history the understanding of the principles of electoral law has been subject to successive transformations. They have been written down, modified, and repeatedly repealed. The attributes of electoral law and their interpretations have been/were constantly changing. In the current understanding, the principles of democratic electoral law in most countries were established after the World War II, whilst in others as late as in the 1990s, but there are plenty of countries that are considered democratic although not all of these rules are applied there. According to Dieter Nohlen, electoral laws were being shaped over a period of approximately 100 years¹. The time of the Great French Revolution, and in particular its initial phase, which resulted in the writing of the first

¹ D. Nohlen, *Prawo wyborcze i system partyjny. O teorii systemów wyborczych*, Warszawa 2004, p. 39.

fundamental law, was of key importance to the development of the modern form of the rules of electoral law.

1. The imminent breakthrough

The reasons for the outbreak of the Revolution were numerous and diverse. Among them were both those underlying the foundations of the then social, legal, and economic system, i.e. indirect reasons, as well as those more direct – above all in the form of specific events that caused or accelerated the escalation of rebellious moods among the French. The second category of reasons was undoubtedly the fact of convening the first general assembly in the United States after a period of 140 years, i.e. the nationwide representation of a state that had previously been the victim of the peak of absolutist rule. The decision of Louis XVI taken together with the finance minister Loménie de Brienne² was announced on 8 August 1788, and the date of the initiating meeting was set on 5 May 1789. This is how elections and electoral law were connected with the fate of revolutionary France from the very beginning. The subsequent stages of systemic transformation of the state resulted in the development of rules and successive systems of regulating the establishment of representative bodies, thus depicting the views and political programmes of governments.

Originally the assembly was to be held in the form used in 1614 (i.e. prior to the elimination of the Estates General from political life), i.e. separately and with each of the three states represented by equal numbers. In such a circle, it was also required to vote separately (*vote par ordre*). However, supporters of the reforms quickly focused on the postulate of doubling the number of representatives

² L. Brienne, who held the post from 1787, immediately after the election stepped down discouraged by the opposition of the nobility and the clergy with regard to his broad plans for reforms of the crisis-stricken state. The office of Minister of Finance was taken over by J. Necker, whose “wonderworking” skills were definitely overrated. J. Baszkiewicz, *Historia Francji*, Wrocław–Warszawa–Kraków 2004, p. 328.

of the third estate (commonly referred to as *Tiers*) and individual voting (*vote par tête*), which offered the chance to gain votes among the liberal representatives of the nobility and the clergy. An informal political group demanding such reforms³ began to be called the “patriotic party”. They managed to convince the Minister of Finance of this concept. Jacques Necker was aware of the need of a thorough reform of the tax system, and in particular of the requirement to deprive the first and second estate of privileges. He knew perfectly well that this idea would be rejected by these assemblies⁴. Hence, he supported the vision of doubling the number of representatives of the third estate, as well as the principle of individual voting (although limited only to matters of a financial nature). In December 1788 the royal council yielded to his position regarding the number of representatives. Issues regarding the voting procedure were not

³ J. Egret emphasizes that for the still “timid” (politically inactive, modest in direct expectations from the government) *Tiers* of that period, the relative caution of these postulates was an incentive to act. In fact, more radical slogans could act as a deterrent, especially in the provinces. Idem, *La Pré-Révolution française*, Paris 1962, p. 360. This was confirmed by the moderate tone of the “complaints notebooks” of the third estate – lists of postulates regarding reforms of the state and law, written before the convocation of the General States (*Cahiers de doléances*). Cf. more: M. Morabito, D. Bourmaud, *Historia konstytucyjna i polityczna Francji (1789–1958)*, Białystok 1996, pp. 65–67.

⁴ A. de Tocqueville pointed to the problem of the deep social divisions of France meticulously used by the central government on the eve of the Revolution: “The division of classes was the crime of the old monarchy, and later it became its excuse; for when all those who make up the rich and enlightened part of the nation are not able to reach an agreement anymore and help one another in governing – the country can no longer rule itself and the intervention of authority becomes necessary”. He further quoted the most brilliant minister of the “old monarchy” A. R. J. Turgot: “A nation is a community composed of diverse states and people, whose members are connected by very few bonds, therefore everyone cares only for their own interest. [...] Common interest is nowhere in sight. Villages, cities do not maintain closer relations with each other than the districts they belong to. They cannot even agree on the conduct of public works that are necessary for them. In this constant war of grudges and initiatives His Majesty is forced to decide everything alone or through his representatives. Royal orders are awaited to contribute to the public good, to respect others’ rights, and sometimes to be allowed to exercise their own rights”. A. de Toqueville, *Dawny ustrój i rewolucja*, Warszawa 2005, p. 146.

resolved, but postponed. The “patriots” of the third estate, however, decided that it was a foregone conclusion⁵.

The doubled number of representatives of the third estate reflects its clear quantitative dominance in society (although still insufficient, the Tiers was then estimated as 96–98% of the nation). To some extent, the postulate of Father Emmanuel-Joseph Sieyès contained in the pamphlet *What is the third estate?* – was one of the most popular and influential of the views among the French on the eve of the Revolution (the first anonymous edition was published in January 1789). The impressive introduction to this book constitutes one of the symbols of the era: “The plan of this work is quite simple. We need to pose three questions. 1. What is the third estate? – EVERYTHING. 2. What has it been hitherto in the political order? – NOTHING. 3. What does it desire to be? – TO BECOME SOMETHING”⁶.

Sieyès’s main objective was to demonstrate the injustice and illogical foundations of the country’s political system which prevented its development. The argumentation was simple, suggestive, and legible, hence the extraordinary success of the publication. At the same time, he sketched out the concept of a thorough reconstruction of the system of power: “Individual wills are the only elements of the common will. It is not possible to deprive the greatest number of individual wills of their right to contribute to its formation or decree that ten wills should have a value of one or that ten others should be worth thirty. To do so is a contradiction in terms and a manifest of absurdity. Reasoned argument is pointless if for a single moment one abandons the self-evident principle that the common will is the opinion of the majority, not the minority. By the latter token, one might just as well take the will of a single person to be the will of the majority, and then there would be no need for the Estates General or a national will, etc. [...] If the will of a noble is worth ten, why not make the will of a minister worth a hundred, or a million, or twenty-six million? With reasoning

⁵ J. Baszkiewicz, op.cit., pp. 328–329.

⁶ E. J. Sieyès, *Czym jest stan trzeci? Esej o przywilejach*, Warszawa 2016, p. 49.

like that, one might as well send all the Nation's deputies home and impose silence on all popular protestation. [...] It is patently obvious that in any national representation, either ordinary or extraordinary, influence should be in proportion to the number of individual heads that have a right to be represented. To do what it has to do, a representative body always has to stand in for the Nation itself⁷.

This is how it is interpreted by Stanisław Salmonowicz: "Despite its concise form, the brochure, or even the constitutional treaty, contained, in clear formulations which were not free from propagandistic influence, several of the aforementioned fundamental issues, whose settlement, in line with Sieyès's indications, was to undermine the legitimacy of the existing system of absolute monarchy and thus open the path to conceiving a state based on the sovereignty of a people, or, in other words a nation⁸. First of all, Sieyès rejected the official concept of holding sessions of the Estates General according to traditional principles, thus each state was to hold sessions separately, and only the third estate remained an underprivileged state. The king did not necessarily have to take this into account. According to Sieyès, the third estate of the kingdom is in fact its nation, as it unites at least 96% of the population! Sieyès makes further demands on the basis of this statement: The Estates General, a product of the Middle Ages, should be trans-

⁷ Ibidem, p. 109.

⁸ G. Mairet, *Le principe de souveraineté. Histoire et fondements du pouvoir moderne*, Paryż 1997, p. 100, G. Mairet, who generally minimizes the role of Sieyès by pointing to the fundamental importance of Rousseau, treats Sieyès' text as clever but sans *nouveauté* (literally, devoid of novelties). Its main advantage he sees in transferring Rousseau's concepts to concrete situations in 1789. No one questions the great role of Rousseau, which does not mean that there are no major differences in their views. Sieyès strongly rejected the concept of direct democracy, a key concept for Rousseau. Not without reason, on 21 May 1789 it was Mirabeau who, in his speech, paid tribute to Sieyès as a man who revealed "the true principles of representative government". A. Leca, *Histoire des idées politiques. Des origines Au XXe siècle*, Paryż 1997, p. 247. Without denying the role of Rousseau, we would say that Sieyès' concept of a nation was a rational, individualising, utilitarian formula, and one embodied in the language of law.

formed into a real representation of the French nation, i.e. into a National Assembly, which, by representing the sovereignty of the nation, should build a new system for France, i.e. become (as it actually happened later) a Constituent Assembly, i.e. a National Assembly, which, independently (without asking the monarch's opinion) would create a new constitution, that is a new system for France. Sieyès' words sounded extremely revolutionary within the walls of Versailles, the meeting place of the Estates General: the only sovereign in the French state will no longer be the king, and the basic rules of the French monarchy formulated in the 16th century by Jean Bodin will no longer apply, as the sovereign is the French nation represented by the National Assembly"⁹.

The electoral law in the Estates General was highly diversified, and each region had its own regulations in this respect. In addition to the general election bylaws of January 24, 1789, Louis XVI issued 77 local ordinances. In practice, it was less important who would represent the region, than what the elected representative had to fight for. It was therefore more important for voters to sign in the "complaints books" – lists of postulates concerning the reform of the state and the law (*Cahiers de doléances*)¹⁰, whereas the issue of selecting the right people was pushed to the background, owing, inter alia, to the fact that political parties had not yet established themselves¹¹.

As in 1614, in principle the constituencies were 190 judicial districts (bailiwicks), which were not equal in terms of area and population. Each state elected representatives separately. The no-

⁹ S. Salmonowicz, *Emmanuel-Joseph Sieyès i jego epoka*, in: E. J. Sieyès, op.cit., pp. 9–10.

¹⁰ According to A. Okolski, there were three stages of writing down "ledgers of complaints". First, they were created for particular deputies, noting down the complaints and indicating the needs which required the issuance of new legal acts. Next the *cahiers de doléances* were arranged for the whole of the city, and it was only during the General States' deliberations that one common "ledger" was created for the entire state. Idem, *Ustrój państw europejskich i Stanów Zjednoczonych Ameryki Północnej*, Warszawa 1887, p. 192.

¹¹ B. Zdaniuk, *Wybory parlamentarne we Francji 1789–1914. Problem reprezentatywności wyboru*, Warszawa 2005, pp. 19, 23.

bility with the right of ownership of landed property could vote in the places of their location (it was possible to vote *per procura*, just as it was possible to vote on behalf of women – usually widows – heiresses of their husbands and on behalf of underage owners), while others were required to meet additional conditions – be 25 years old, be a native or naturalized Frenchman, and reside in the bailiwick. The elections for the nobility in both cases were direct. However, the clergy were divided into two groups. The owners of benefices (bishops, mitred prelates, prelates and parish priests) belonged in the first group that elected deputies on analogous principles like the nobles with property – i.e. directly. The second category included clergy without benefices living in the country (the extension of this group was made at the request of the king who counted on the fact that ordinary clergy would be better acquainted with the problems of the masses). They chose from their group delegates, who voted for deputies only in the second stage of elections. Indirect elections were also foreseen for the third estate¹².

As far as the Tiers is concerned, any Frenchman was eligible who met the requirement of age census (25 years old) and was included in the tax register of his parish (to prevent voting several times, as well as voting by migrant workers and financially dependent people)¹³. In villages the electorate gathered in the assemblies of the basic level, where the constituency was the parish. One representative per 100 families was elected. Small towns elected 4 representatives each. In larger cities, the elections were performed in professional corporations, of which each chose one representative per 100 members, while corporations of free professions were

¹² M. Morabito, D. Bourmaud, *op.cit.*, p. 61.

¹³ In practice, it was not verified whether the voter was entered in the register, hence the view that the elections in the third estate were almost devoid of the condition of property census. The exception was Paris – voters were meticulously controlled there, and the tax rate in the capital city was quite high (6 livres), which resulted in only 10% of residents being allowed to vote. Another problem also consisted in the issuance of the Paris Ordinance as late as two weeks before the vote, which meant that the representatives of this city joined the General States much later. Nonetheless, they still turned out to play the most important role there. *Ibidem*, p. 62; B. Zdaniuk, *op.cit.*, p. 22.

allowed to choose 2 people per 100 members. Other people, who did not belong to any corporation, gathered in a specially created corporation only for the needs of the elections, and they were more privileged than employees of ordinary corporations, and just like liberal professions, they could choose 2 representatives per 100 persons. All representatives from a given city formed an assembly of the third estate for that city, which in turn, designated representatives for the assembly of the bailiwick. The elected representatives joined in the bailiwick with electors elected in the villages and in small towns, and jointly elected deputies in a secret ballot following a complicated procedure¹⁴.

The voting at this level began on 16 March 1789 and lasted for three consecutive days. On the first and second days, an absolute majority of votes was necessary to win, while on the third day a simple majority was sufficient¹⁵.

In the spring of 1789, the places reserved for nobles in the Estates General were occupied mainly by the aristocracy; the clergy were represented as to one third by bishops, abbots, mitred prelates, and high prelates, while two thirds were parish priests and canons of urban and rural areas. In turn, burghers were represented by over 200 attorneys and notaries, 158 officials of lower courts, 80 merchants, 40 farmers, 50 rentiers, and several doctors, writers, and military officers, as well as several representatives of the clergy who were not admitted to assemblies in their estate¹⁶, as for instance Father Sieyés. In total, 1118 deputies started their political career (250 from the first, 291 from the second and 577 from the third estate)¹⁷.

The Count de Mirabeau described the first meeting of third-level deputies in the following manner: "Imagine five hundred or so men stuffed into one Hall, not knowing one another at all, gathered from

¹⁴ M. Morabito, D. Bourmaud, *op.cit.*, pp. 61–63.

¹⁵ B. Zdaniuk, *op.cit.*, p. 23.

¹⁶ F.A. Aulard, H. Carnot, E.B. Bax et al., *Historia rewolucji francuskiej*, transl. W.M. Kozłowski, Warszawa 1910, s. 68.

¹⁷ J. Baszkiewicz, S. Meller, *Rewolucja francuska 1789–1794. Społeczeństwo obywatelskie*, Warszawa 1983, p. 10.

various sides, without leaders or hierarchy; everyone is free and equal [...] and everyone, typically of the French, before they listen, they want to be listened to”¹⁸. The ceremony was also organized according to the old order: when the third estate was entering the debate, both doors were opened to the nobility and the clergy, while for the townspeople only one¹⁹.

Initially, therefore, the debates were held separately. However, the proclamation of merging the forums and individual vote (*vote par tête*) became the first significant postulate of the liberals to the government, which managed to unite deputies not knowing one another and who were not only from the third estate. On June 10, representatives of the Tiers called the remaining estates to do the same, receiving a positive response from part of the clergy (particularly the poorer part, parish priests and canons). On June 17, 1789, the thus broadened third estate proclaimed itself the National Assembly, and in the end it was joined by the majority of the clergy. The King, incited by the aristocracy, tried to intervene cautiously (including the famous episode with closing of the meeting room and the passage of “patriots” to the *jeu de paume* (real tennis hall), where they pledged to pass the constitution), but finally, on 27 June, he yielded and consented to the deliberations of the merged deputies from all the estates. On 7 July, a constitutional commission was established, and the National Assembly began to function formally from 9 July. They also started to be referred to as the Constituent Assembly. A few days later the unstable ruler, pressured by conservative elites, tried to use the strongest of arguments by gathering 20 thousand troops in the capital and dismissing Necker; however this is when the distressed city of Paris came to the rescue of its representatives, thus leading to the events of 14 July, i.e. to what is known as the Municipal Revolution²⁰. The moods between the ruling camp and the Constituent Assembly relatively quickly calmed down. As early as on 17 July the king came to the capital (modestly dressed, without the usual ceremonial retinue). At the

¹⁸ Cit. after: *ibidem*, p. 7.

¹⁹ F.A. Aulard, H. Carnot, E.B Bax. et al., *op.cit.*, p. 30.

²⁰ J. Baszkiewicz, *op.cit.*, pp. 332–333.

meeting in the town hall with the Parisian self-government, he accepted the three-coloured cockade and pinned it to his hat. This was considered to institute new national colours. On the same day, it was decided to erect the monarch's monument in the place of the Bastille that was already being pulled down (these plans were made before the outbreak of the revolution, the dreary and unusable symbol of the *Ancien régime* was to be replaced by the square and a monument dedicated to the king with the inscription "The reviver of public liberty")²¹. The agreement between the government and the bourgeoisie was further strengthened by the need to pacify the Great Fear – violent revolts of the peasant masses. The path to the peaceful reform of France had thus been opened.

The changes progressed rapidly. In the face of unrest in the countryside, the dismantling of feudal institutions was accelerated (the law passed overnight on 4/5 August). The adoption of the Declaration of the Rights of Man and of the Citizen, which took place on 26 August 1789, became crucial for the future of the democratizing processes occurring in the state and law, including the principles of electoral law. The act soon proved to be the most important legal symbol of the Revolution.

The document was inspired by the works of Enlightenment philosophers and the Declaration of Independence of the United States of America in 1776, and in particular declarations of the laws of American states²², such as Virginia and Massachusetts. The declaration above all pertained to the freedom of all and equality before the law: "Men are born and remain free and equal in rights. Social distinctions can be founded only on the common good" (Article 1)²³.

²¹ A. Zamoyski, *Święte szaleństwo. Romantycy, patrioci, rewolucjoniści 1776–1871*, Kraków 2015, pp. 88, 91.

²² On this subject, see a work controversial at the time of publication by G. Jellinek, *Deklaracja praw człowieka i obywatela*, Warsaw 1905 where he argued the non-originality of the French document as compared with American texts. A study from contemporary perspective, cf. K. Sójka-Zielińska, *Drogi i bezdroża prawa*, Wrocław 2010, pp. 139–140, 145–152.

²³ Art. 1 of the Declaration of the Rights of Man and of the Citizen as of 26 August 1789, in: P. Sarnecki, op.cit., p. 18.

What was significant for the development of the principles of electoral law was a number of further articles of the Declaration. Article 3 proclaimed the sovereignty of the nation – “The principle of any sovereignty resides essentially in the Nation. No body, no individual can exert authority which does not emanate expressly from it”²⁴. In turn, art. 12 considered the need to establish an independent legislature in universal and equal elections: “The guarantee of the rights of man and of the citizen necessitates a public force: this force is thus instituted for the advantage of all and not for the particular utility of those to whom it is entrusted”²⁵. Article 6 stipulated the procedure of passing laws, in which the decisive vote fell on the nation, on the common will in the conditions of representative and direct democracy, which is *prima facie* expressed by the words “personally or through their representatives”²⁶. The system of division of the authorities and guaranteeing subjective liberties is emphasized in particular in art. 16: “Any society in which the guarantee of rights is not assured, nor the separation of powers determined, has no Constitution”²⁷.

When on September 3, 1791 the Constituent Assembly adopted the constitution of the still monarchical France, it was decided to add to it the Declaration of the Rights of Man and of the Citizen of 26 August 1789 as its constituent, its formal preamble. Subsequent constitutions (already republican) of 1793 and 1795 contained newly formulated versions of the declarations, however, the original version, which was proposed to the French representatives in 1789 by General Marie de la Fayette – “The Hero of Two Worlds” – re-

²⁴ Art. 3 of the Declaration, *ibidem*.

²⁵ Art. 12 of the Declaration, *ibidem*, p. 20.

²⁶ Art. 6 of the Declaration: “The law is the expression of the general will. All the citizens have the right of contributing personally or through their representatives to its formation. It must be the same for all, either that it protects, or that it punishes. All the citizens, being equal in its eyes, are equally admissible to all public dignities, places, and employments, according to their capacity and without distinction other than that of their virtues and of their talents”, *ibidem*, p. 19.

²⁷ Art. 16 of the Declaration, *ibidem*, p. 20.

mains to this day a living symbol²⁸, a reference point for subsequent generations of democrats on the Seine and throughout the world.

2. The desired constitutional era

The basic law was adopted on 3 September 1791. It established an electoral ordinance, in particular regarding elections to the unicameral legislative assembly (Assemblée Legislative), commonly referred to as the Legislature²⁹.

The elections were based on the principles of universality, equality, and indirectness. The constitution did not include a provision on secrecy of voting, but in practice it was conducted by throwing cards into ballot boxes³⁰. The representatives of the Constituent Assembly could not be part of the Legislative Assembly, as decided in the decree of 16 May 1791, as proposed by Maximilian Robespierre. It is believed that such a solution was meant to strike the faction of the so-called constitutionalists who counted on another re-election³¹, although it is also explained by the motives of magnanimity and the desire to please the burghers³². Indeed, Sieyès had already written about such a need: “The Nation ought to have

²⁸ More on French declarations of rights cf.: Z. Filipiak, *Trzy deklaracje praw człowieka i obywatela. Zmienne pryncypia Wielkiej Rewolucji Francuskiej*, „Kultura i Edukacja” 2017, No. 3 (117), pp. 74–91.

²⁹ According to B. Zdaniuk, elections to the Legislature under the Constitution of 1791 were to be based on 4 legal acts. In addition to the constitution, these included: the decree of 22 December 1789 on the establishment of basic level assemblies and administrative assemblies; an instruction from 8 January 1790, on the establishment of representative assemblies and administrative bodies, and the Act of 28 August 1791, abolishing the requirement of a fine of silver. B. Zdaniuk, op. cit., pp. 256–257. In fact, during the first elections to the Legislature, the last of these laws and constitutional regulations regarding censuses were not used and previous provisions were applied in this respect. This will be discussed later in this dissertation.

³⁰ J. Baszkiewicz, S. Meller, op.cit., p. 59. A. Żukowski, *Istota formuły demokratycznych wyborów – kilka refleksji teoretycznych i terminologicznych*, „Studia Wyborcze” 2006, vol. I, p. 56.

³¹ J. Baszkiewicz, S. Meller, op.cit., p. 15.

³² F.A. Aulard, H. Carnot, E.B. Bax et al., op.cit., p. 68.

been convoked to depute a set of extraordinary representatives to the capital with a special mandate to draft the constitution of an ordinary National Assembly. I would not have wanted these representatives to have been given any power to become, under any other quality, an ordinary assembly in keeping with the constitution that they themselves had established. I would have been fearful that instead of working solely for the national interest, they would have paid too much attention to the interest of the body that they were about to form"³³. As a result he himself did not sit on the Assembly.

In accordance with the adopted assumptions, in the event that one of its members was elected to the Legislature, he should relinquish the mandate. "In concord with this concept, quite rare in parliamentary history, those deputies [to the Constituent Assembly – Z.F. and T.K.] should have been content with the work they had already done – as comments S. Salmonowicz"³⁴. The elections were held in in September 1791. Many young Frenchmen became deputies, and so contributed to the radicalization of the political attitudes of the Assembly³⁵.

Under the constitution of 3 September 1791, the nation was the sovereign³⁶. However, it could exercise its authority only through delegation and representation, constituted by the king and the Legislative Assembly³⁷. In accordance with Article 2 Chapter I of

³³ E.J. Sieyès, *op.cit.*, p. 110.

³⁴ S. Salmonowicz, *op.cit.*, p. 16.

³⁵ Most deputies were under 40 years of age. The oldest age was 69. However, these deputies usually already had political and administrative experience thanks to prior service in local authorities and the judiciary. In terms of education and profession, lawyers dominated, but the chamber also included writers, publicists, doctors, and clergy. Relatively few representatives were gained by the rich bourgeoisie. In turn, the members of the Constituent Assembly, who were forbidden to sit in the Legislature, were usually sent to prestigious provincial positions – for this reason, from the spring of 1791, they insistently canvassed for the favour of their constituents, vigorously fighting in the Constituent Assembly for local interests. J. Baszkiewicz, S. Meller, *op.cit.*, pp. 12, 18.

³⁶ Art. 1 of Title III of the French Constitution of 3 September 1791: P. Sarnecki, *op.cit.*, p. 33.

³⁷ Art. 2 and 3 of Title II of the French Constitution of 3 September 1791: *ibidem*.

Title III, the term of office lasted two years. A limitation of re-election was adopted, which consisted in the possibility of re-election to the Assembly only after a break of one term³⁸.

The principle of universality was limited by censuses, including property censuses. In accordance with the assumptions of Sieyès' concept³⁹, the population was divided into active (*citoyens actifs*) and passive citizens (*citoyens passifs*). As the author himself pointed out: "all the inhabitants of a country ought to enjoy within it the passive rights of a citizen: all have a right to the protection of their person, of their property, of their liberty, etc.; but all do not have a right to take an active part in the formation of public powers. [...] Those, who contribute to the public establishment can be likened to the true shareholders of the great social enterprise. They alone are the true active citizens"⁴⁰.

Thus, there was a census with regard to gender (men)⁴¹, age (25 years) and domicile: a permanent residence in the canton was

³⁸ Art. 6 of Section III Chapter I Title III of the French Constitution of 3 September 1791: *ibidem*, p. 38.

³⁹ According to them, the census system was introduced in France earlier, by virtue of a decree of 22 December 1789 on the appointment of basic and administrative assemblies. Later constitutional solutions in particular reduced the property requirements of candidates for election as deputies, which will be further discussed in this article. M. Morabito, D. Bourmaud, *op.cit.*, p. 94.

⁴⁰ Cited after: *ibidem*, p. 93.

⁴¹ It is worth remembering that in revolutionary France there were additional doubts about the electoral rights of some groups of adult men, regardless of their property. The issue dealt with the earliest was the discrimination of Protestants inherited from the times of absolutism – in practice they were not forbidden to participate in the general elections to Estates General of 1789, but it was not until 24 December 1790 that Constituent Assembly passed the provision on their full access to all positions. The situation of the Jews was more complicated, especially that in the south of France (the Sephardic branch of Spanish-Portuguese decent) they had a better status and were more assimilated with the rest of society, while in the East (the Ashkenazi branch mainly inhabiting Alsace) they were denied civil rights and were charged high fees. These inequalities were eliminated only three days before the end of the term of the Constituent Assembly, on 27 September 1791 – by granting civil rights to eastern Orthodox Jews (Sephardic Jews obtained this earlier, on 28 January 1790). The Legislature confirmed this in November 1791, but in order for all Jews to exercise their rights in practice, they still had to take a citizenship

required during the elections. In addition, electoral rights were dependent on paying a direct tax equal to a minimum value of three days' work. It was necessary to be simultaneously entered on the list of the national guard of one's commune and to take a citizenship oath⁴². Electoral rights were not granted to servants⁴³, or to bankrupts indicted after the declaration of bankruptcy or insolvency established by the court on the basis of authentic documents (Article 5 of Section II of Chapter I of Title III). The elections were always to take place on the second Sunday of March⁴⁴.

According to Article 7 of Section II of Chapter I of Title III of the Constitution, an elector could be only a man meeting additional requirements – residents of cities with a population of over 6,000 should be owners or users of real estate with a minimum income of 200 days of local working time, residents of cities with less than 6,000 inhabitants – owners of properties with a minimum income of 150 days of local working time, whereas residents of the countryside needed to possess assets with a minimum income of 150 days of local working time. The adopted differences resulted

oath, which they mostly did at the turn of 1791 and 1792. Despite the appeals of some of the influential leaders of the revolution, the Constituent Assembly refused to grant civil rights to free the black population. Slavery was abolished on 28 September 1791 only in the metropolis and sustained in colonies. A few days earlier, on 24 September, it was decided that the condition for obtaining civil rights was a white skin colour, W. Markov, A. Soboul, *Wielka rewolucja Francuzów 1789*, Wrocław–Warszawa–Kraków–Gdańsk–Łódź 1984, p. 123; B. Zdaniuk, *op.cit.*, pp. 33–36.

⁴² As B. Zdaniuk emphasizes, in the era of the Revolution a person was not so much already a citizen as he became one. The term *nationalité* was used in the sense of active citizenship rather than ethnical affiliation. As a result, the route towards participation in politics was opened to those who were not born French, but who lived in the country and were socially involved. B. Zdaniuk, *op.cit.*, pp. 30–31. By the way, the obligation to take a citizenship oath as a condition of admission to vote meant a specific exclusion of orthodox opponents of democratic reforms, if of course they wished to take part in the elections.

⁴³ Art. 2 of Section II of Chapter I of Title III of the French Constitution of 3 September 1791: P. Sarnecki, *op.cit.*, p. 34.

⁴⁴ Art. 1 of Section II of Chapter I of Title III of the French Constitution of 3 September 1791: *ibidem*, p. 35.

from the fact that people living in larger cities in principle earned more than the rural population or residents of small towns (main industry and trade were located in larger agglomerations). At the same time, a person elected by the electoral experts to the Legislative Assembly as a representative of the nation could be any active citizen⁴⁵. It also follows that the regulations for the electors were more stringent than for the deputies elected by them.

Moreover, the basic act also provided for the institution *incompatibilitas*⁴⁶. It prohibited merging the mandate of the deputy with the office of a minister or other officers of the executive power, as well as the position of the National Treasury Commissioner, collector of direct taxes, officer directing the collection and management of indirect taxes and management of national domains related to the king's military and civil service, department administrator, deputy department administrator, municipal officer, commander of the national guard⁴⁷, and a judge⁴⁸.

Pursuant to the regulation stipulated in Article 5 of Section III of Chapter I of Title III of the Constitutions, judges elected to the Legislature would receive leave and were to be replaced by proper substitute judges⁴⁹.

⁴⁵ Art. 3 of Section III of Chapter I of Title III of the French Constitution of 3 September 1791: "All active citizens, whatever their position, profession, or tax, may be elected representatives of the Nation": *ibidem*, p. 37.

⁴⁶ Current definition of *incompatibilitas* and the varying views on this legal institution are provided by: D. Lis-Staranowicz, *Niepołączalność mandatu parlamentarnego w polskim prawie konstytucyjnym*, Warszawa 2005, p. 267. A different position on this institution is presented by: M. Sobczyk, A. Sokala, *Ograniczenia biernego prawa wyborczego w orzecznictwie Trybunału Konstytucyjnego*, in: *Amicus hominis et defensor iustitiae. Przyjaciel człowieka i obrońca sprawiedliwości. Księga Jubileuszowa w 70. rocznicę urodzin Sędziego Ferdynanda Rymarza*, eds. D. Dudek, M. Gapski, W. Łączkowski, Lublin 2010, p. 319 et seq.

⁴⁷ Art. 4 of Section III of Chapter I of Title III of the French Constitution of 3 September 1791: P. Sarnecki, *op.cit.*, p. 37.

⁴⁸ Art. 5 of Section III of Chapter I of Title III of the French Constitution of 3 September 1791: *ibidem*.

⁴⁹ Art. 5 of Section III of Chapter I of Title III of the French Constitution of 3 September 1791: "The performance of judicial duties is incompatible with

In order to be able to make practical use of the voting right, it was required to be entered in the electoral list of one's district. The lists were drawn up every two years and published in each canton two months prior to the meeting of the primary assembly which chose the electors. It is worth noting here that an opportunity to raise electoral claims was offered: persons excluded from the list could make claims regarding their inclusion. They were addressed to special tribunals which considered cases on an *ad hoc* basis⁵⁰.

Ensuring the principle of universality of the electoral law under the French Constitution of 3 September 1791 left much to be desired in comparison with the egalitarian provisions of the Declaration of the Rights of Man and of the Citizen. Despite the fact that the previously established requirement of making a payment in the amount of three daily wages was not seen as extreme, all the requirements of the censuses entitling to vote in first-degree elections were met by approximately 4.3 million citizens (out of 26 million people). It is worth noting, however, that the exclusion of the poorest from electoral rights – beggars, vagabonds, or traveling workers – was explained by the fear that, like servants, they could be used by the aristocracy offering to buy their votes. The even higher property requirements for electors were justified by increased responsibility for the election of deputies. It was claimed that this should be done by financially stable, commonly known, and pre-

those of representative of the nation, throughout the entire duration of the legislature. Judges shall be replaced by their substitutes, and the King shall provide, by warrants of commission, for the replacement of his Commissioners at the courts": *ibidem*.

⁵⁰ Art. 4 of Section IV of Chapter I of Title III of the French Constitution of 3 September 1791: "Every two years, in every district, lists of active citizens, by cantons, shall be drawn up, and the list of each and every canton shall be published and posted two months before the meeting of the primary assembly. Claims which may be made, either contesting the qualifications of citizens entered on the list or on the part of those alleging their unjust exclusion therefrom, shall be taken to the courts for summary judgment. In all matters not rectified by judgments rendered prior to the meeting of the assembly, the list shall serve as the basis for admission of citizens to the next primary assembly": *ibidem*, p. 38.

dictable persons. However, this system was criticized by radical democrats. Robespierre called it a semi-liberty (*demi-liberté*), while Camille Desmoulins was the author of the famous enumeration that under these conditions neither Mably nor Rousseau could become representatives of the nation. Hence, the Constituent Assembly decided to reduce the requirements for candidates for the position of deputy themselves – according to B. Zdaniuk, the system was no longer reminiscent, as before, as before, of a pyramid, but of an hourglass – with a “bottleneck” turned towards the second-degree voters. In the end, these provisions of the Basic Law never entered into force – they were adopted too late after the electoral procedure for the Legislature had begun, just before the adoption of the constitution (after the king’s flight to Varennes, on 27 August 1791). Therefore, it was decided that they would be applicable in two years’ time, at the subsequent elections (which, of course, did not happen). As a result, during the vote to the Legislative Assembly, the more exclusionary censuses were applied from the decree of 22 December 1789. Thus, once again it was easier to become an elector (the census in the amount of ten daily wages was sufficient), but much harder to become a deputy – it required a direct payment of one silver mark and possession of some landed property⁵¹. The “experimental hourglass” had to make room for the well-known pyramid – radical democrats⁵² were again defeated in the fight against the forces of the conservative bourgeoisie.

The principle of equality was to be realised by assigning one vote to each person in a given canton, which at the same time constituted an electoral district for active citizens. Electors, on the other hand, gathered in 83 departments across France (constituencies for electors)⁵³. The number of 745 deputies was divided into three

⁵¹ M. Morabito, D. Bourmaud, *op.cit.*, pp. 94–95; A. Mathiez, *Rewolucja francuska*, Warszawa 1956, pp. 106–107.

⁵² It is worth noting, however, that the intense campaign against the “silver mark”, or property censuses, mobilized more radical citizens and contributed to the increase in popularity of later Jacobin leaders, especially Robespierre. A. Mathiez, *op.cit.*, p. 106.

⁵³ B. Zdaniuk, *op.cit.*, p. 257.

election groups. In the first of them, 247 deputies were elected according to the territorial division of the country, and each department was represented by three representatives (only Paris was represented by one person)⁵⁴. In the second group, 249 deputies were elected, and the election mode was related to the size of the population. The total population of the whole country was divided by this number (249) and the quotient obtained before the decimal point was the number of people elected in a given department⁵⁵. In the third group, 249 representatives were selected according to the direct tax paid. The total value of the direct tax was divided by 249 and the quotient obtained before the decimal point gave the number of persons elected in a given department⁵⁶. As visible *prima facie*, the principle of equality of electoral law in this respect was very limited. Nonetheless, the guaranteed formal equality⁵⁷, according to which every citizen had one and not several votes as was the case in many subsequent elections that still took place in the twentieth century, was an achievement for that time. At the same time, it can be recognized that several serious restrictions were related to material equality⁵⁸, as the country was not uniformly divided into constituencies, i.e. departments for electors (while for active citizens – cantons)⁵⁹.

⁵⁴ Art. 3 of Section I of Chapter I of Title III of the French Constitution of 3 September 1791: P. Sarnecki, *op.cit.*, p. 36.

⁵⁵ Art. 4 of Section I of Chapter I of Title III of the French Constitution of 3 September 1791: *ibidem*.

⁵⁶ Art. 5 of Section I of Chapter I of Title III of the French Constitution of 3 September 1791: *ibidem*.

⁵⁷ More on formal equality cf. A. Sokala, B. Michalak, P. Uziębło, *Leksykon prawa wyborczego i referendalnego oraz systemów wyborczych*, Warszawa 2013, s.v. principle of electoral equality, p. 209; I. Nakielska, *Zasady prawa wyborczego*, in: *Leksykon historii prawa i ustroju. 100 podstawowych pojęć*, ed. T. Maciejewski, Warszawa 2010, p. 699.

⁵⁸ Material equality means the division of the country into equal constituencies. According to such a division, the strength of each voter should be identical, i.e. each voter should elect more or less the same number of deputies. Cf. A. Sokala, B. Michalak, P. Uziębło, *op.cit.*, s.v. principle of electoral equality, p. 209; I. Nakielska, *op.cit.*, p. 699.

⁵⁹ B. Zdaniuk, *op.cit.*, p. 257.

The indirectness of elections meant a two-stage voting procedure. First, active citizens chose the electors, who only then selected the appropriate deputies to the Legislative Assembly. The author of this concept was again Father Sieyès. According to his views, an ordinary voter could not properly learn and evaluate the institution of legislature, or select the right people, but was able to select the best people from a smaller group at the local community gathering. This was the role of electors, who, having knowledge and political experience, were only to pick appropriate persons for the Legislative Assembly. Sieyès proclaimed that: "voters commission the execution, and to commission the execution means to select the best experts, and not order them exactly what to do, because then what would be the role of such experts and the former commission could also be subject to deliberations. Therefore, to commission the execution means solely to select the experts and frequently change them, so that if they make mistakes on their part, their successors, chosen precisely by those who noted the mistake and want to repair it, are able to reconcile the divergent interests"⁶⁰.

Electors were appointed proportionally to the number of active citizens residing in a given town where voting took place. One elector was appointed per 100 active citizens, regardless of their presence at the assembly. At the number of 150 active citizens, allowed to appoint 2 electors, while with 250 active citizens 3 electors were selected, i.e. with the increase in the number of active citizens, the number of electors also increased⁶¹. The prevailing preference among the citizens of that time was to attend first-degree elections and participate in the collective votes for their electors. The turnout sometimes exceeded 85% of those entitled to vote⁶².

Electors chose deputies by an absolute majority of votes in the number allocated to their department⁶³. The mandate was obtained

⁶⁰ Cit. after: *ibidem*, p. 29.

⁶¹ Art. 6 of Section II of Chapter I of Title III of the French Constitution of 3 September 1791: P. Sarnecki, *op.cit.*, p. 36.

⁶² J. Baszkiewicz, S. Meller, *op.cit.*, p. 7.

⁶³ Art. 2 of Section III of Chapter I of Title III of the French Constitution of 3 September 1791: P. Sarnecki, *op.cit.*, p. 37.

by a person who received 50% + 1 vote. At the same time, electors were electing deputies in the number of 33% of their number from a given department⁶⁴.

3. Conclusions

The basic principles of democratic electoral law began to develop in the revolutionary France of the late eighteenth century. It was a rocky road, because the clarity of the assumptions represented by the Declaration of the Rights of Man and of the Citizen could hardly be translated into the language of real politics. The person mostly responsible for the development of the shape of the rules of electoral law was father Sieyès with his concept of active and passive citizens, a system of censuses and indirect voting. In particular, the fiction of possession of civil rights by the poorest was created – 3 million Frenchmen (passive citizens), referred to by Sieyès as “labouring machines”, were excluded from participation in elections. As Albert Mathiez emphasized, it was a step backwards in comparison to the rules applied in the elections to the Estates General in 1789, when voters were required only to be entered in the tax registers⁶⁵, whilst in practice this was not even checked (outside Paris). Sieyès’ liberal concept won. According to him only an owner is really independent, autonomous in his opinions, and hence may take decisions. He used to call such active citizens “real shareholders of a large social enterprise”. However, even they (about 60% of adult men) did not have full electoral rights as they did not elect deputies, but only electors, and in order to be included in this

⁶⁴ Art. 1 of Section III of Chapter I of Title III of the French Constitution of 3 September 1791: “The electors chosen in each and every department shall assemble to elect the number of representatives whose election is assigned to their department, and a number of substitutes equal to one-third of that of the representatives. The electoral assemblies shall be formed, without need of sanction, the last Sunday in March, if they have not been convoked previously by the public functionaries determined by law”, *ibidem*.

⁶⁵ A. Mathiez, *op.cit.*, p. 105.

group they were to pay a proportionally higher tax. Citizens who could become deputies belonged to the elite of society – their taxes were 20 to 25 times higher than the taxes of active citizens! In turn, the indirectness of the elections was criticized as a wall between active citizens and deputies, on whom in practice they had little influence. Left-oriented historians will call this the replacement of the primacy of the nobility with the supremacy of the aristocracy of money, in order to keep the masses away from voting⁶⁶. Members of the Constituent Assembly were not deaf to the critique of these regulations, however the slightly more progressive regulations of the Constitution of 1791 remained a dead letter.

In the socio-political situation of that time it is difficult to deny the correctness of Sieyès's views, as with the slogans proclaiming the broadening of access to political rights, crowds of disappointed Frenchmen began to mobilize and demand the eradication of *demi-liberté*. They will repeat Camille Desmoulins's words: "What exactly do you want to say by continuously repeating the words 'active citizen'? Active citizens are those who conquered the Bastille, those who transform fallows into cultivated fields"⁶⁷. The result will be radical Jacobin rule and a new chapter in the history of French electoral law.

STRESZCZENIE

Powstanie zasad prawa wyborczego w rewolucyjnej Francji

Proces wykształcania się nowoczesnych zasad prawa wyborczego rozpoczyna się wraz z fundamentalnymi przemianami ustrojowymi, do których doszło na skutek wybuchu Wielkiej Rewolucji Francuskiej. Artykuł ukazuje przełomowy moment zwołania Stanów Generalnych po 140 latach, walkę o bardziej sprawiedliwy system przedstawicielstwa stanu trzeciego – mieszczan i chłopów stanowiących 96% narodu, a następnie stworzenie nowego mechanizmu cenzusów, które skutecznie utemperowały nadzieje radykalnych demokratów. Koncepcja obywatelstwa czynnego i biernego, której autorem był ksiądz Emmanuel-Joseph Sieyès, utrwaliła polityczne

⁶⁶ W. Markov, A. Soboul, op.cit., p. 123.

⁶⁷ Cit. after: ibidem, p. 124.

zdobycze burżuazji i została zaadoptowana w pierwszej konstytucji Francji z 1791 r.

Słowa kluczowe: Francja; rewolucja; wybory; głosowanie; burżuazja; cenzus; demokracja

SUMMARY

The establishment of electoral law in revolutionary France

The process of developing modern electoral law begins with the fundamental changes of the political system that occurred as a result of the outbreak of the French Revolution. The article shows the breakthrough moment – the resurrection of the Estates General, the fight for a fairer third estate representation system – (the bourgeoisie and the peasants represented 96% of the nation) and then the creation of a new census suffrage system that effectively suppressed the hopes of radical democrats. The concept of active and passive citizenship, developed by Emmanuel-Joseph Sieyès, consolidated the political achievements of the bourgeoisie and was adopted in the first constitution of France in 1791.

Keywords: France; revolution; elections; vote; bourgeoisie; census suffrage; democracy

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